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Supreme Court, U.S.
FILED

(1) 07-303 SEP 5 - 2007

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

MICHAEL TAYLOR,
Petitioner,

v.

LARRY CRAWFORD, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 5, 2007

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CAPITAL CASE

QUESTIONS PRESENTED

In this case, the United States District Court for the Western District of Missouri, after hearing testimony of the executioner and prison officials and making detailed factual findings, held that Missouri's system for carrying out executions by lethal injection was implemented in so cavalier and haphazard a manner that it created an unreasonable risk of torturous death, and thus violated the Eighth Amendment's ban on cruel and unusual punishments. The United States Court of Appeals for the Eighth Circuit reversed, holding that even egregious deficiencies in a State's implementation of its procedures are constitutional unless they are the result of deliberate indifference. It also reversed the trial court's copious fact findings with little analysis, and overturned the court's exercise of its remedial discretion in rejecting the State's proposed written protocol. The questions presented are:

1. Did the Eighth Circuit err in holding, in conflict with the Ninth Circuit, that a State's needlessly dangerous manner of implementing its execution protocol violates the Eighth Amendment only if state officials are deliberately indifferent to the unreasonable risks created by their practices?

2. Did the Eighth Circuit err in reversing the trial court's conclusion that Missouri's execution procedures as they existed at the time of trial were unconstitutional, as well as its remedial holding that the State's post-trial proposed written protocol failed to remedy the numerous dangers revealed by the trial record?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Eighth Circuit.

Michael Anthony Taylor was the appellee below. Appellants were Larry Crawford, Director, Missouri Department of Corrections; James D. Purkett, Superintendent, Eastern Reception, Diagnostic and Correctional Center, Missouri Department of Corrections; and John Does 1-5, anonymous executioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Anthony Taylor respectfully requests this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit, reported at 487 F.3d 1072 (8th Cir. 2007), is reprinted at Pet. App. 1a. The decision of the United States District Court for the Western District of Missouri, reported at 2006 WL 1779035 (W.D. Mo. 2006), is reprinted at Pet. App. 27a. The district court's remedial order is set forth at Pet. App. 45a. The order of the Eighth Circuit denying rehearing and rehearing *en banc*, is set forth at Pet. App. 49a.

JURISDICTION

The Court of Appeals' judgment was entered on June 4, 2007. A timely petition for rehearing and rehearing *en banc* was denied on August 7, 2007. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Eighth Amendment to the Constitution, U.S. Const. amend. VIII. Pet. App. 50a.

STATEMENT OF THE CASE

A. Introduction.

Petitioner Michael Taylor is a condemned inmate for whom the State of Missouri has requested, but not yet obtained, a death warrant. In 2005, Taylor filed this suit in the Western District of Missouri, alleging that the execution procedures of the Missouri Department of Corrections ("DOC") subjected him to a significant unreasonable risk of suffering excruciating pain during his execution.[1] Before

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[1] Taylor brought suit under 42 U.S.C. § 1983. The jurisdictional basis of the suit was 28 U.S.C. § 1331.

that suit had run its course, the State set an execution date and moved to cut off discovery and obtain an expedited ruling in the case. In doing so, the State represented that Taylor faced no risk of torturous death because he would receive a 5-gram dose of the anesthetic thiopental, which would ensure a painless death. On the strength of that representation – which was repeated to a panel of the Eighth Circuit on the day of Taylor's scheduled execution – the lower courts rejected Taylor's claims, finding the successful injection of the asserted anesthetic dose would minimize the risk of excruciating pain. After the Eighth Circuit *en banc* stayed Taylor's execution, the DOC, seeking to have the stay vacated, repeated its representation before this Court.[2]

After the stay was upheld and the case remanded to the district court for discovery into the DOC's actual implementation of its stated procedures, Taylor learned that the DOC's executioner, a surgeon known as John Doe 1 ("Doe"), had planned to administer to Taylor *half or less* of the represented dose of thiopental. DOC officials, who admitted not understanding the execution procedures, had delegated total authority to Doe, who was incompetent and had been barred from practice at two hospitals. Despite evidence of pervasive shoddy and unprofessional conduct that exposed inmates to a significant risk of pain, the DOC's only response was to reaffirm its trust in the surgeon and its faith that executions were performed humanely. After a bench trial, the district court found that "numerous problems" rendered the procedures unconstitutional. Pet. App. 39a. The Eighth Circuit reversed, holding that even egregiously deficient procedures like the DOC's are constitutional unless they result from deliberate indifference.

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[2] *See* Application to Vacate Stay of Execution, *Crawford v. Taylor*, No. 05A699, 11 & n.2 (U.S. filed Feb. 1, 2006).

B. The DOC's Execution Procedures At The Time Of Trial.

Missouri law delegates complete responsibility for designing and implementing execution procedures to the DOC. *See* Mo. Ann. Stat. § 546.720. Like all other States employing lethal injection, the DOC has chosen to use a three-drug cocktail designed to cause death quickly and without visible movements. Pet. App. 17a-18a. Thiopental, the first drug injected, is an ultrashort-acting anesthetic that must be mixed into solution shortly before it is used. *Id.* 31a. The second drug, pancuronium, masks all visible suffering by paralyzing the inmate's muscles. It does not reduce consciousness of pain. *Id.* 18a. The last drug injected, potassium, induces cardiac arrest. When administered in concentrations sufficient to stop the heart, potassium causes an excruciating burning sensation in the veins. *Id.*

Because both pancuronium and potassium inflict extreme suffering if injected into a conscious person, the induction of general anesthesia is crucial to ensuring a humane execution. If the injection of the intended dose of thiopental is not completely successful, or does not result in deep anesthesia, the inmate will experience conscious suffocation and excruciating pain. Indeed, this drug combination is so sensitive to error and potentially inhumane that Missouri law prohibits its use in animal euthanasia without anesthetic monitoring by adequately trained professionals. *See* Mo. Ann. Stat. § 578.005(7), -007(7), -012.

After a botched execution in the mid-1990s, the DOC chose to delegate complete responsibility for designing and implementing its execution procedures to Doe. Pet. App. 60a. Doe had no training in anesthesia and was unable to calculate or keep track of doses of drugs because he was dyslexic. *Id.* 65a. DOC officials apparently did not understand the significance of his limitations, however, as they were unaware that potassium causes pain or that general

anesthesia is a necessary component of the DOC's chosen procedure. *Id.* 109a; CA App 973.[3]

When Larry Crawford became DOC Director in 2005, rather than educating himself on the execution procedure, he chose to remain "dependent" on Doe as the *only* authority on the procedure. Pet. App. 40a, 105a-106a. The DOC's only instruction to Doe was with respect to the DOC's primary objective in performing executions: to ensure that no observable incidents would lead witnesses to question the execution process. *Id.* 87a. As Doe put it, Crawford told Doe to "keep him looking good ... so he does not have to go out and explain why we made a mistake or we may have a problem or why it didn't go smoothly ...." *Id.* Doe's goal was thus to perform executions "with no apparent suffering that the public can observe, which they will make the most of" – and he acknowledged that the paralyzing effect of the pancuronium aided greatly in this endeavor, *id.* 62a-63a.

The DOC gave Doe free rein to supervise executions, even neglecting to promulgate the written execution protocol that is standard in all other States. *Id.* 34a-35a, 88a; Trial Tr. 16-17[4]; CA App. 814. DOC officials thus remained ignorant of, and indifferent to, Doe's actions on execution nights. Pet. App. 40a. The evidence obtained in discovery demonstrated that Doe exercised his authority to vary crucial elements of the procedure in a dangerous manner. In five of the past six executions,[5] Doe had difficulty mixing the intended 5-gram dose of thiopental – which could have meant that the thiopental was defective – and therefore prepared an unknown *substantially lower* quantity for each execution. CA App. 627; Pet. App. 54a-60a. The DOC failed to keep

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[3] "CA App." refers to the DOC's appendix in the Eighth Circuit.

[4] "Trial Tr." refers to the transcript of the June 2006 bench trial.

[5] The district court severely limited discovery, over Taylor's objections, to records of the past six (out of 66) executions; depositions of Crawford and Doe; and interrogatories to the execution team.

records of how much thiopental was given in any execution, and Doe's dyslexia prevented him from calculating doses, Pet. App. 65a, 68a, so it is impossible now to determine the actual administered dosage.[6] *Id.* 56a-57a. Doe never informed the DOC about the lowered dose because it did not make a "visible difference" in the appearance or length of the execution. *Id.* 64a. Reducing the anesthetic would make no "visible difference" because the pancuronium ensures that all executions *appear* peaceful, even if the inmates receive inadequate thiopental and remain conscious and in pain.

Doe also opted to use, instead of the standard peripheral IV, an invasive and more dangerous femoral catheterization procedure on all inmates. *Id.* 95a-97a, 109a-110a. Doe and the DOC did not consider the severe medical risks associated with this procedure, *id.* 95a-97a, or obtain the equipment necessary to treat frequent complications. Doe botched the catheterization in at least one of the past six executions, causing bleeding and potentially severe pain. Trial Tr. 50, 157-58. Though Doe denied the occurrence, he stated that should such a complication arise, he would not treat it: "He's got two legs." Pet. App. 93a-94a.

The DOC's other execution team members, who worked under Doe's supervision, lacked sufficient training and qualifications to ensure that executions were performed properly or to alleviate Doe's errors.[7] Doe 2, a licensed practical nurse, is a non-professional with minimal medical training. Mo. Ann. Stat. § 335.016(7), (9); CA App. 453-54. Despite helping Doe prepare thiopental, he did not realize that Doe was preparing incorrect doses. CA App. 812, 465. And the remaining Does, inject the drugs during executions, have no medical training at all. *Id.* 814; Pet. App. 71a

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[6] According to the DOC's expert anesthesiologist, 1.5 grams of thiopental is the lowest dose that should be used in an execution. Trial Tr. 264.

[7] Taylor was not permitted to depose these individuals.

("That's the first time probably in their life they have picked up a syringe ... so it's a little stressful for them to be doing this."). According to Doe, these personnel were unable to perform their tasks without his supervision. *Id.*

Taylor presented all of this evidence at trial, as well as the testimony of three medical experts – two anesthesiologists and an interventional radiologist. These experts explained that Doe had created a significant risk of inadequate anesthesia and demonstrated his misunderstanding of anesthesia and his poor medical judgment. Moreover, the DOC had exacerbated the risks of its chosen procedure by having untrained personnel inject the drugs from a separate, dark room, through many feet of IV tubing, without any meaningful ability to observe the inmate or catheter site.

Despite the glaring deficiencies, incompetence, and misrepresentations revealed in discovery, DOC officials reacted by expressing their continued confidence in Doe and the existing execution procedures. Pet. App. 106a-107a; 110a-111a; Trial Tr. 357. Even after hearing Taylor's medical expert testimony, Crawford testified that he intended to continue to depend on Doe for all decisions regarding the procedure; would not change any aspect of the procedures; would create what he termed an execution protocol by writing down the intended doses of drugs, leaving all else to Doe; and that he saw no need to consult medical experts regarding the dangers of the procedure. Pet. App. 111a-112a.

C. The District Court's Ruling And Injunction.

On the basis of this evidence and its firsthand observation of Doe's and DOC officials' testimony, the trial court ruled that Missouri's execution procedures created a significant and unreasonable risk of inflicting extreme pain and suffering, and therefore violated the Eighth Amendment. The Court found "numerous problems" plaguing the execution procedure, which extended from Crawford's

purposeful "dependence" on Doe and complete failure to supervise the procedures, to Doe's own inability to perform execution tasks properly and the convoluted method of injecting drugs in the dark. *Id.* 37a-42a.

Having found an Eighth Amendment violation, the court crafted an injunction to ensure that whatever mistakes and deviations occurred during the procedure would not result in the infliction of pain. In principal part, the court ordered the DOC to promulgate a written protocol and retain an anesthesiologist to monitor inmates' anesthetic depth in order to verify that inmates have reached, and remain in, a surgical plane of anesthesia. The court left the DOC with discretion over all other aspects of the procedure. *Id.* 42a-44a, 46a-48a.

Rather than complying with the injunction, the DOC submitted a short proposed written protocol that was designed to allow Doe to continue using essentially the same practices as before. CA App. 215, 249, 255. Most importantly, the protocol lacks any effective monitoring of anesthetic depth; instead, it employs untrained personnel to "check consciousness" by touching the inmate, a test that is meaningless, as Taylor demonstrated, for several reasons. *Id.* 249-53, 291-341; *see infra*. Nor does the protocol address the numerous other problems afflicting the procedure. *Id.* 253-57. Accordingly, the trial court rejected the proposed protocol, though it also relaxed the monitoring requirement to permit the State to retain a physician with anesthesia training. Pet. App. 45a-46a. Finally, the court barred Doe's participation in executions. *Id.*

D. Proceedings In The Eighth Circuit.

The Eighth Circuit reversed the trial court's judgment and vacated its injunction. Throughout the appellate briefing and argument, the DOC asserted its right to continue to rely on Doe to supervise executions. Three months after argument, the DOC informed the court, without explanation, that Doe

would no longer participate. Shortly thereafter, the Eighth Circuit issued its decision, which assumed Doe's departure, but was entered without any record as to who would perform executions in his absence. *Id.* 8a-9a n.3.

In its appeal, the DOC argued, despite failing to do so in the trial court, that the Eighth Amendment prohibits pain inflicted during an execution only if it is the result of deliberate indifference, and that the trial court consequently had applied the wrong legal standard.[8] Taylor responded that the trial court's standard, which holds unconstitutional execution procedures that subject inmates to an unreasonable risk of pain, is well-grounded in the Eighth Amendment and has been applied by numerous courts.[9]

The Eighth Circuit created a two-tier Eighth Amendment standard. First, it held that although the Eighth Amendment prohibits punishments that subject inmates to an unreasonable risk of pain, only the *written* protocol constitutes "state-sanctioned punishment." *Id.* 15a. Any danger of pain caused by factors that are not "inherent" in the written protocol but rather due to lapses in the implementation of the protocol is not "state-sanctioned punishment." Rather, it is either "accidental or a deviation from the official procedure, which would require a showing of an intent to harm or deliberate indifference." *Id.* 16a-17a.

The court next conducted an "independent review" of the DOC's written protocol to determine its constitutionality on a stand-alone basis – even though the trial court rejected that protocol in its remedial discretion, as an insufficient alternative to the court's injunction. Without an analysis of

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[8] Not only had the DOC failed to raise this argument throughout the proceedings below, but it affirmatively adopted the district court's "unreasonable risk" standard in its post-trial filings. *See, e.g.*, CA App. 360-62, 364, 366, 370.

[9] Taylor also argued that the DOC had waived its argument.

whether the protocol would effectively remedy the constitutional violation found by the trial court, the Eighth Circuit concluded that the protocol does not create an unreasonable risk of excruciating pain and is therefore constitutional. *Id.* 17a-18a; 20a. The Eighth Circuit relied on the fact that the written protocol calls for a sufficient dose of thiopental to be "proper[ly] deliver[ed]" to the inmate through a "functioning" IV by an EMT, nurse or doctor. *Id.* 20a. Moreover, the court concluded that the protocol provided for "confirmation that the prisoner is unconscious," thereby reversing the trial court's finding that the "consciousness check" would not be effective. *Id.* 19a.

In the penultimate paragraph of its opinion, the Eighth Circuit turned to the trial court's ruling that the DOC's execution procedures at the time of trial violated the Eighth Amendment. Without further elaboration, the Eighth Circuit concluded that Taylor "ha[d] not adduced evidence" of a "constitutional violation" for two reasons. *Id.* 23a. First, despite the court's earlier acknowledgement that the paralytic effect of the pancuronium would render any pain undetectable to observers, the court found "no evidence" in execution logs created by lay observers that the past six inmates had suffered any pain. Second, no "state actor was deliberately indifferent" to a risk of unnecessary pain. *Id.*

REASONS FOR GRANTING THE PETITION

This case presents two exceptionally important questions affecting the administration of the death penalty today: what is the proper Eighth Amendment standard governing a State's implementation of its execution procedures, and what are the minimal performance standards and safeguards a State must adopt in carrying out lethal injections? Across the Nation, state and federal courts are grappling with, and diverging on, these precise questions as they confront increasing concerns that lethal injection – which is employed by thirty-seven States and the federal government – is being administered in

a manner that risks, and often results in, excruciating pain. Many petitioners have sought this Court's review of their lethal-injection claims – but usually in an emergency posture before discovery. This petition is the first that comes to the Court after a full trial to judgment, remedial proceedings, and full appellate review. It therefore offers this Court a uniquely well-timed and appropriate occasion to provide urgently needed guidance to the States and lower courts.

First, the Eighth Circuit held that a State that maintains a minimally facially adequate written protocol may *perform* executions in an egregiously negligent, dangerous manner, so long as its officials are not deliberately indifferent to the dangers created by their deficient practices. That holding, though consistent with a decision of the Seventh Circuit, conflicts with the Ninth Circuit's rule that execution procedures are unconstitutional if they subject inmates to an unreasonable risk of pain – whether that risk arises from the written protocol or its implementation. *See, e.g., Beardslee v. Woodford*, 395 F.3d 1064, 1073-76 (2005); *Morales v. Tilton*, 465 F. Supp. 2d 972, 978-79 (2006). This Court should adopt the Ninth Circuit's "unreasonable risk" standard for all aspects of a State's performance of executions, because that standard is a logical extension of the Eighth Amendment's requirement that States make reasonable efforts to ensure that their execution procedures avoid "unnecessary cruelty" in light of evolving standards of decency, scientific understanding, and available alternative execution procedures. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *see Furman v. Georgia*, 408 U.S. 238, 430 (1972) (Powell, J., dissenting, joined by Burger, C.J., Blackmun, J., and Rehnquist, J.). The subjective deliberate indifference standard employed by the Eighth Circuit, in contrast, was developed to address concerns specific to an unrelated Eighth Amendment doctrine – prison conditions – and does not account for state obligations in administering executions.

Second, this Court should review the Eighth Circuit's conclusory determination that the DOC's execution procedures at the time of trial did not violate the Eighth Amendment, and its reversal of the trial court's remedial findings regarding the adequacy of the DOC's proposed written protocol in light of the ample trial record of negligence and disregard. The Eighth Circuit cavalierly and improperly ignored the trial court's findings and the extensive evidentiary record, which demonstrated both the severe flaws in the DOC's preexisting procedures and its inability to administer the procedure reliably going forward. This detailed record of maladministration and incompetence, as well as the thorough consideration given to the DOC's deficiencies by the trial court, renders this case an ideal vehicle to consider the minimum safeguards that a State must implement in performing executions by lethal injection.

I. The Eighth Circuit's Ruling That Lethal Injection Plaintiffs Must Demonstrate Deliberate Indifference Is Erroneous And Conflicts With The Decisions Of The Ninth Circuit And Other Courts.

A. The Eighth Circuit Created A Circuit Split Regarding The Eighth Amendment Standard Applicable To Lethal-Injection Challenges.

This Court should review the Eighth Circuit's creation of an Eighth Amendment framework that prohibits inhumane executions only when the cruelty is the result of prison officials' deliberate indifference. Although at first glance, the decision appears to have adopted the "unreasonable risk" standard urged by Taylor, a reading of the opinion as a whole demonstrates that the Eighth Circuit applied the "unreasonable risk" standard only to the DOC's written protocol, while concluding that any risk of pain caused by the DOC's *implementation* of the protocol – *i.e.*, any failures to perform the tasks listed in the protocol properly – is not cognizable unless it is the result of deliberate indifference.

The Eighth Circuit began with the standard announced in *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), that "punishment must not involve the unnecessary and wanton infliction of pain." Pet. App. 12a. Although the DOC had argued, invoking the prison-conditions gloss on the *Gregg* standard, *see Wilson v. Seiter*, 501 U.S. 294, 300-02 (1991), that pain inflicted during execution is "punishment" for Eighth Amendment purposes only if it is inflicted with deliberate indifference, the Eighth Circuit rejected that argument with respect to the DOC's official written protocol. Pet. App. 15a-16a. Because the court viewed the written protocol as "state-sanctioned punishment," no mental state was necessary: the protocol would be unconstitutional if it "inflict[ed] unnecessary pain, aside from any consideration of specific intent on the part of a particular state official." *Id.* 16a-17a ("foreseeable" "inherent risk[s] in Missouri's written procedure" of pain are unconstitutional).

The court recognized that the written protocol must be implemented by execution personnel in order to accomplish executions. But it viewed any failure to perform executions "as designated in the protocol" as a "deviation from official procedure" rather than punishment. *Id.* 16a-17a (contrasting deviations and mistakes, which are not "official," with the written "designated procedure for deliberately carrying out the prescribed penalty"). Therefore, because "[t]he Supreme Court requires an inquiry into the state of mind of particular state officials ... where the official conduct does not purport to be part of the official penalty," *id.* 15a, any failure to implement the protocol properly – even if the direct result of the DOC's policies – "require[s] a showing of an intent to harm or deliberate indifference." *Id.* 17a.

The court then applied the deliberate indifference standard to Taylor's claim that the DOC's procedures at the time of trial violated the Eighth Amendment. In concluding that Taylor had not "adduced evidence at any stage of this

litigation that [proves] a constitutional violation," the court relied on a perceived lack of evidence that "any state actor was deliberately indifferent to the Constitution's" prohibition on unnecessary pain. *Id.* 23a. Although the court did not discuss any of the trial court's findings, this language clearly indicates that the court rejected the trial court's holding that the DOC's numerous deviations and mistakes created an unreasonable risk of pain, and that this unreasonable risk rendered the procedures unconstitutional.

In practice, the Eighth Circuit's decision will require virtually all lethal-injection plaintiffs to demonstrate deliberate indifference in order to prevail.[10] The Eighth Circuit's adoption of two different legal standards rests on a legally incorrect and functionally meaningless distinction between the written protocol and the many other circumstances and actions that compose the execution process. Regardless whether an inhumane execution is caused by actions specifically required by the protocol or by "deviations" from the intended procedure, that inhumane execution *is* the punishment imposed by the State. *Every* aspect of the punishment of execution is legally committed to the DOC. And it is plain that in executing its responsibility, the DOC's ability to implement the protocol is just as crucial a determinant of the humaneness of any execution as is the written protocol. *See Morales*, 465 F. Supp. 2d at 981.

In requiring deliberate indifference, the Eighth Circuit created a circuit split that has since deepened, and departed from the holdings of several state and district courts. The Seventh Circuit has also recently adopted the deliberate

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[10] Taylor has intervened in a lawsuit filed by other inmates in the wake of the Eighth Circuit's decision, challenging the qualifications of the DOC's execution team, which may include Does 2-5. That action will be subject to the Eighth Circuit's erroneous deliberate indifference ruling, and therefore Taylor's potential participation in the suit does not affect the issues raised by this petition.

indifference standard in method-of-execution cases, and, like the Eighth Circuit, rejected the inmate's claim in part because of a perceived lack of deliberate indifference. *See Lambert v. Buss*, No. 07-2378, __ F.3d __, 2007 WL 2265143, at *5 (7th Cir. Aug. 9, 2007). Lambert and his co-plaintiffs challenged both the protocol and its implementation. *See id.* at *2 (citing *Woods v. Buss*, No. 07-2001, __ F.3d __, 2007 WL 1302119 (7th Cir. May 3, 2007)). The court rejected the claim, stating that Lambert had failed to satisfy the *Gregg* standard as interpreted by *Wilson* because he did not present "evidence of the ... necessary subjective element of an Eighth Amendment violation – the requirement of deliberate indifference." 2007 WL 2265143, at *4-*5.

In contrast, the Ninth Circuit has squarely held that "[t]he 'deliberate indifference' standard is not directly applicable ... to [execution] methodology questions." *Campbell*, 18 F.3d 662, 682 n.12 (9th Cir. 1994). Campbell asserted that Washington's hanging procedures "pose[d] an unacceptable risk of causing death [inhumanely] by ... asphyxiation," *id.* at 687, and, by proffering evidence that hangings sometimes were botched, challenged both the protocol and its implementation. Unlike the Seventh and Eighth Circuits, the Ninth Circuit framed the question whether hanging "involve[d] the unnecessary and wanton infliction of pain" under *Gregg*, *id.* at 683, as an "objective" one: whether "the risk has been minimized as much as possible," *id.* at 682, 687 n.17. Because "methodology review focuses ... heavily on objective evidence of the pain involved," *id.* at 682 & n.11, the Ninth Circuit relied on "objective factors to the maximum extent possible" and therefore framed the issue as whether there was an "unacceptable risk" of pain. *Id.* at 682 & n.12; *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1039 (N.D. Cal. 2006) (examining "the objective evidence of the pain involved" in the "implementation" of protocol) (citing *Fierro v. Gomez*, 77 F.3d 301, 306 (9th Cir. 1996)).

In the context of lethal-injection actions, the Ninth Circuit has refined the *Campbell* standard, holding that execution procedures are unconstitutional if the "particular method employed" by officials to whom the responsibility is delegated, *Beardslee v. Woodford*, 395 F.3d 1064, 1073 (9th Cir. 2005), "subject[s inmates] to an unnecessary risk" or "undue risk" of unconstitutional pain, *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004); *Morales*, 415 F. Supp. 2d at 1046 (finding that deficient implementation of protocol likely gave rise to undue risk); *Morales*, 465 F. Supp. 2d at 974. Unlike the Eighth Circuit, *Beardslee* applied the objective "undue risk" standard to evidence that the State's *implementation* of the protocol was deficient, as well as to evidence that the protocol was inherently dangerous. 395 F.3d at 1074-76 (discussing implementation failures arising from poor training and the failure to correct "problems").[11]

Numerous district and state courts – including the district court in this case – have followed the Ninth Circuit and applied its standard to States' execution procedures – protocol and implementation – as a whole. *See, e.g., Cooey v. Taft*, 430 F. Supp. 2d 702, 708 (S.D. Ohio 2006) (finding "unacceptable risk" where personnel were unqualified to implement protocol), vacated on other grounds, 479 F.3d 412 (6th Cir. 2007); *Brown v. Beck*, No. 06 CT 3018, 2006 WL 3914717, at *8 (E.D.N.C. Apr. 7, 2006); *Baze v. Rees*, 217 S.W.3d 207, 209-10 (Ky. 2006) (recognizing that untrained personnel inserting a jugular catheter created a "substantial risk" regardless of their mental state); *State v. Lightbourne*, No. 81-170-CF-A-01 (Fla. Cir. Ct. July 31, 2007).

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[11] *Beardslee* held that the inmate, before discovery, had not shown a sufficient likelihood of success for a stay. Another inmate, after discovery, proved that the State's implementation of its protocol created unreasonable risks. *See Morales*, 465 F. Supp. 2d at 981.

B. This Court Should Adopt The "Unreasonable Risk" Standard To Govern All Aspects Of A State's Lethal Injection Procedures.

The Eighth Circuit's requirement of deliberate indifference is fundamentally inconsistent with this Court's Eighth Amendment jurisprudence, and this Court should grant review in order to adopt the "unreasonable risk" standard. That standard, requiring officials to reasonably minimize foreseeable risks of pain, is a logical extension of the States' long-recognized obligation, in executing the punishment of death, to avoid the infliction of unnecessary pain. *See Gregg*, 428 U.S. at 173; *Furman*, 408 U.S. at 430 (Powell, J., dissenting).[12] The deliberate indifference standard, in contrast, would excuse States' unreasonable failure to avoid unnecessary cruelty, thereby making *Gregg*'s prohibition on unnecessary pain a hollow promise.

1. The Eighth Amendment Imposes Obligations Of Reasonable Care In Performing Executions.

A claim that a method of execution is cruel and unusual implicates the original, core concerns of the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (prohibition of "physical 'torture or lingering death'" was the "evil[] of most immediate concern to the drafters of the [Eighth] Amendment") (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)). Because execution is unquestionably a punishment that is subject to the Eighth Amendment, severe

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[12] Indeed, Justice Kennedy highlighted the importance of the States' *Gregg* obligation, and the question of its interaction with the standard used to judge lethal injection claims, during oral argument in *Hill v. McDonough*, 126 S. Ct. 2096 (2006). He suggested that the States may have a "minimal obligation to do the necessary research to assure that [they use] the most humane method possible," and that the prohibition on "unnecessary" pain means that "the State might have some minimal obligation to investigate" other alternatives, Oral Argument Tr. at 47, *Hill v. McDonough*, 126 S. Ct. 2096 (No. 05-8794) (Kennedy, J.).

pain inflicted during an execution renders that punishment torturous, and therefore unconstitutional, whether or not the State intended to inflict pain. *See Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 477 (1947) (Frankfurter, J., concurring in the judgment) (where "result" of an execution method is "torture," it is unconstitutional); *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879).

Because the Eighth Amendment was never "intended to ... prevent only an exact repetition of history," the scope of the its prohibition on cruel punishments "acquire[s] meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 373 (1910). As a result, "no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives." *Furman*, 408 U.S. at 430 (Powell, J., dissenting). States therefore have a constitutional obligation to ensure that their execution practices comport with evolving standards of decency and scientific understanding, and to adopt available less painful methods. *See Campbell*, 18 F.3d at 682. The source of this obligation is the prohibition on the infliction of "unnecessary" pain during punishment. *Gregg*, 428 U.S. at 173.[13]

The corollary to the State's obligation to reasonably ensure that its procedures are the most humane available alternative is that the State has a concurrent obligation to take due care to ensure that its executions are *performed* humanely. The development and adoption of a theoretically more humane method of execution would be meaningless if the State implemented it in a manner that rendered executions just as cruel as previously discarded methods.

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[13] Of course, States need not attempt to eliminate all pain, no matter how slight, from their execution procedures, and need not conform to medical standards. *See Morales*, 465 F. Supp. 2d at 983.

Moreover, this obligation should be no different when execution procedures are challenged not as necessarily cruel in all cases, but as likely to cause pain in *some* executions: An execution procedure implemented in a way that needlessly inflicts pain in some executions causes "unnecessary" pain across executions in aggregate. Thus, with respect to individual executions, States have a duty to minimize *foreseeable* risks of pain, because a foreseeable risk of pain with respect to individual inmates translates into a subset of needlessly inhumane executions in aggregate.

Though this Court has never definitively recognized this obligation, it has suggested repeatedly that although a State need not prevent "unforeseeable accident[s]," it does have a duty to exercise due care in the course of implementing the punishment of execution. *See Resweber*, 329 U.S. at 462 (defining an "unforeseeable accident" as one for which "no man is to blame" and stating that in absence of evidence to the contrary "we ... assume that the state officials carried out their [execution] duties ... in a *careful and humane manner*") (emphasis added)[14]; *Wilson*, 501 U.S. at 297-98; *see also Bethea v. Crouse*, 417 F.2d 504, 507-08 (10th Cir. 1969).

2. The Deliberate Indifference Standard Addresses Concerns Unique To The Prison-Conditions Context And Is Incompatible With States' Obligations In Performing Executions.

In applying the deliberate indifference standard to the execution context without regard for the States' obligations in performing executions, the Eighth Circuit failed to recognize that *Gregg*'s prohibition on "the unnecessary and wanton infliction of pain," 428 U.S. at 173, "does not have a

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[14] *Resweber*'s precise holding, which attracted the votes of only a plurality of Justices, was that it would not be psychologically cruel and unusual to subject the inmate to electrocution a *second* time after the first attempt was unsuccessful. 329 U.S. at 464. It is thus irrelevant here.

fixed meaning but must be determined with due regard for differences in the kind of conduct" challenged. *Wilson*, 501 U.S. at 302 (internal quotation marks omitted). The deliberate indifference standard was designed to distinguish ordinary prison conditions from punishment by focusing on subjective mental state – but that subjectivity is ill-suited to evaluating official conduct in executing death sentences.

Unlike methods of execution, which have always been considered punishment and therefore implicate the Eighth Amendment's historic core concerns, prison conditions have only recently been considered state-inflicted punishment subject to the Eighth Amendment. *See Rhodes v. Chapman*, 452 U.S. 337, 344-45 (1981). In extending the Amendment to prison conditions, this Court recognized that there are a vast number of unintended or fortuitous prison deprivations that are not inflicted to punish. *See Wilson*, 501 U.S. at 300. Only those injuries which are the result of some quantum of official volition can be characterized as punishment; thus, a "culpable state of mind" is necessary to render a prison deprivation a punishment. *See id.*

This Court chose to use the mental state of deliberate indifference to define the boundary between punishment and ordinary prison deprivations because of the "constraints" facing officials in running prisons. *See Wilson*, 501 U.S. at 302-03 (meaning of the *Gregg* standard varies according to the constraints on prison officials). The standard is thus a reflection of two concerns raised by the extension of the Eighth Amendment to conditions of confinement. First, the "magnitude of the problems of prison administration" demand deference to prison officials' good-faith judgments. *Rhodes*, 425 U.S. at 351 & n.16. Second, the standard protects prisons and courts from being inundated with constitutional challenges to every accident, no matter how far removed from a state intent to punish. *Id.* at 349-51.

Yet unlike prison conditions, the implementation of a

death sentence has always been considered, punishment imposed by the State. *See, e.g., Kemmler*, 136 U.S. at 447. Moreover, prison administration concerns are not implicated by lethal-injection claims, which challenge a discrete, non-security-related procedure employed by a few personnel, affecting only a few inmates, and thus there is no need for "wide-ranging" deference. *Hudson v. McMillan*, 503 U.S. 1, 6 (1992) (internal quotation marks omitted).

Indeed, the subjectivity of the deliberate indifference standard – officials are not liable if "they were unaware even of an obvious risk to inmate ... safety," *Farmer v. Brennan*, 511 U.S. 825, 843 (1994) – is not compatible with the States' obligation, in the execution context, to avoid "unnecessary cruelty in light of presently available alternatives." *Furman*, 408 U.S. at 430. To allow needless, egregious deficiencies to go unremedied because officials are unreasonably ignorant of those deficiencies is to repudiate the Eighth Amendment's command that punishments comport with standards "enlightened by a humane justice." *Weems*, 217 U.S. at 373.

3. The Unreasonable Risk Standard Implements The States' Duty Of Reasonable Care In Executions.

The unreasonable risk standard should apply to *all* aspects of a State's execution procedures because it takes account of both the State's duty to avoid inflicting unnecessary pain in some executions, and the relative lack of institutional constraints facing officials in performing executions. *See Wilson*, 501 U.S. at 302. While state officials need not attempt to prevent unforeseeable accidents or completely eliminate all risks, *see Resweber*, 329 U.S. at 462, they may not unreasonably fail to minimize the foreseeable dangers of excruciating pain. *See Cooper v. Rimmer*, 379 F.3d at 1033.

II. The Eighth Circuit Erred In Finding The DOC's Original Practices And Revised Protocol Constitutional And In Striking Down The Trial Court's Remedy.

This Court should also review the Eighth Circuit's cavalier re-evaluation of the trial evidence and its improper substitution of its own judgment for the trial court's fact findings and remedial discretion. Review of the Eighth Circuit's determination is not only critically important for Taylor, but would also allow this Court to address an issue of pressing national importance by determining the minimal standards a State must adopt in carrying out lethal injections.

A. The Eighth Circuit Improperly Reversed The Trial Court's Judgment That Missouri's Lethal Injection Procedures Violate The Constitution.

1. The District Court's Ruling.

On the basis of two days of trial and six witnesses' testimony concerning the DOC's lethal injection procedure at the time of trial, Doe's testimony, six execution logs, and a video tour of the execution chambers, the trial court concluded that Missouri's execution procedure "subjects condemned inmates to an unnecessary risk that they will be subject to unconstitutional pain and suffering when the lethal injection drugs are administered." Pet. App. 41a. This determination is amply supported the "numerous problems" the trial court found plagued the procedures. *Id.* 39a.

First, the trial court found that the DOC officials had delegated total discretion for the execution protocol" to Doe, and that there "are no checks and balances or oversight." *Id.* 40a. This abdication left the trial court "gravely concerned" because the team that the DOC employed was wholly inadequate to carry out lethal injections safely, and Doe had arbitrarily varied the amount of anesthetic he gave, and "ma[de] mistakes." *Id.* These problems were compounded

by the fact that every other individual involved, from Crawford to the other team members, was forced to rely on Doe because they lacked any medical knowledge of their own. Crawford, moreover, felt that an understanding of the procedure was unnecessary. Pet App. 88a; CA App. 973.

Second, the State had no written protocol guiding the administration of executions, which were "not carried out consistently" and were "subject to change at a moment's notice." Pet. App. 40a. Doe had repeatedly altered the procedure at his whim; his dyslexia created unpredictability by preventing reliable preparation of the doses; and he testified that he was "still improvising" the execution procedures. *Id.* 36a.

Third, the trial court found that the DOC's system of remote drug administration risked injection errors. The court noted Doe's testimony that "the people who do the injections are nonmedical and they're in the dark so they have a small flashlight." *Id.* 37a. The court also heard expert testimony that the lack of "visibility of what they're doing [is] a completely needless set-up for a problem," as it prevents any observation of IV problems or inmate distress. Trial Tr. 82.

Fourth, the trial court found that the DOC does not monitor inmates' anesthetic depth in order to "ensure that [they have] received an adequate dose of anesthesia before the other two chemicals are administered." *Id.* 41a. Although Doe testified that he could monitor anesthetic depth by viewing the inmate's face through a window, the trial court concluded that such an assessment would be "almost impossible" based on its review of videotaped simulations of each team member's view into the execution chamber, as well as extensive expert testimony regarding the training necessary to measure anesthetic depth. *Id.*

2. The Eighth Circuit's Erroneous Record Review.

It was on the basis of this record that the trial court

concluded that the DOC's protocol imposed an unnecessary risk of unconstitutional pain and suffering. The trial court's determination was entitled to deference. Its factual findings regarding risk could be reviewed only for clear error, *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985), particularly where determinations of credibility and demeanor were at issue. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401 n.3 (2006).

But rather than defer to the trial court, the Eighth Circuit added a cursory coda to the end of its opinion (which up until that point had concerned only the remedy the trial court imposed), and stated that "[w]e emphasize that Mr. Taylor has not adduced evidence at any stage of this litigation that carries his burden of proving a constitutional violation. We have very carefully examined the entire record, and we find no evidence to indicate that any of the last six inmates executed suffered any unnecessary pain that would rise to an Eighth Amendment violation." Pet. App. 23a.

The Eighth Circuit's reasoning does not withstand scrutiny. As the trial court found, and as all parties agree, the use of pancuronium during the execution process completely paralyzes inmates, thereby masking the effect of any pain caused by the potassium that follows it. The Eighth Circuit itself recognized this just a few pages earlier in its opinion when it said "[t]here is no dispute, however, that *the use of the second chemical in the sequence will simultaneously mask any visible sign of ... pain.*" Pet. App. 17a-18a (emphasis added). Thus, even close observation of the inmate from the bedside – which the DOC did not do – would fail to detect signs of pain in paralyzed inmates. Only monitoring of anesthetic depth by a trained professional, which the DOC also did not provide, could detect

consciousness and pain in paralyzed inmates.[15] There is therefore no basis – let alone one sufficient to overcome the trial court's copious findings – for concluding that records of the past six executions could demonstrate the safety of the execution process.

The Eighth Circuit's decision erroneously and dramatically raised the bar for proving that execution procedures violate the Eighth Amendment. By the Eighth Circuit's reasoning, almost any documented, significant risk of error in the administration of the protocol will not give rise to a violation, because the pancuronium "mask[s] any visible sign of ... pain." That is a perverse and unsubstantiated ruling that warrants this Court's review. In finding no violation, the Eighth Circuit has approved Missouri's historic practice of conducting executions without a written protocol, deferring to unqualified medical personnel, and using dangerous catheterization and injection techniques. Review by this Court is necessary to set a baseline minimum standard of safeguards for Missouri – as well as States around the country – in carrying out lethal injection.

3. The Eighth Circuit's Erroneous Deliberate Indifference Ruling.

The Eighth Circuit also held that Taylor had not proven a violation at "any stage of the proceeding" because he had failed to show deliberate indifference. Pet. App. 23a. As explained above, the deliberate indifference standard is entirely inapposite to a method of execution claim, and it its use here conflicts with the decisions of other courts and this Court. But even if deliberate indifference were the proper standard, reversal of the Eighth Circuit would still be necessary. First, it was entirely inappropriate for the Eighth

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[15] Although there are post-hoc methods of determining whether inmates were adequately anesthetized, such as postmortem toxicology, Missouri, unlike other states, does not undertake them. Pet. App. 4a.

Circuit to reverse the trial court and not provide any remand given that the DOC had not pressed the deliberate indifference argument in the trial court. At minimum, then, summary reversal of the Eighth Circuit's decision to not allow a remand to present evidence as to deliberate indifference is warranted.

Second, even though the deliberate indifference standard was never presented to the trial court, the trial record is replete with evidence that would support a finding of deliberate indifference. Defendant Doe, the only person with any meaningful authority over the execution process, admitted to making mistakes and to consciously varying the dose thiopental he administered. Pet. App. 65a. His actions evince deliberate indifference (at best). Thus, in the event that this Court approves a deliberate indifference standard, it should still reverse the Eighth Circuit.

B. The Panel Wrongly Reversed The Trial Court's Determination That The Written Protocol Was Inadequate And The Trial Court's Remedial Ruling That The DOC Needed To Obtain The Services Of An Anesthesia Professional.

Although the Eighth Circuit found that there was no underlying constitution violation, the opinion went on to adjudicate and vacate the trial court's determination that Missouri's revised protocol was inadequate, and that the DOC instead needed to obtain the services of medical personnel trained in measuring anesthetic depth. The Eighth Circuit made two critical errors in vacating the trial court's decision. First, it upheld the written protocol on the basis of an "independent" review that ignored the trial court's findings. Pet. App. 20a. Second, the Eighth Circuit failed to give proper deference to the trial court's remedial determination that the DOC needed to obtain a person trained in administration of anesthesia. The trial court viewed overwhelming evidence of the DOC's incompetence and

mismanagement, and its remedy was a reasonable response rather than an abuse of discretion. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

1. The Revised Protocol Is Inadequate.

As with the DOC's original practices, the trial record demonstrates that the revised protocol is also inadequate. In upholding the revised protocol, the Eighth Circuit primarily relied on a tautology. It reasoned that because the revised protocol called for the dose of thiopental to be "successfully delivered" through a "properly functioning IV" there was no "constitutionally significant risk of pain." Pet. App. 20a. But Taylor has never disputed that the *successful* delivery of 5 grams of thiopental would be constitutionally adequate. What he does dispute, and what the trial court found, is that the revised protocol still creates a substantial and unnecessary risk that the lethal injection process *will not* be administered properly because it largely memorializes the inadequate practices the DOC had been employing.

The Eighth Circuit ignored this record of incompetence when it ruled that the revised protocol was adequate. Considered in light of the record, it is evident that it is, for the most part, simply a written version of Doe's unsafe execution practices. *Id.* 110a-111a; CA App. 215, 249, 255. Thus, although the revised protocol calls for the delivery of a theoretically adequate dose of thiopental, it keeps in place the same convoluted, blind drug delivery system designed by Doe and implemented by personnel who have no knowledge of anesthesia or anesthetic depth, that the trial court found fraught with the potential for error. *Id.* 215-17; 256-57.

The only material difference in the written protocol is that the DOC simply inserted a few purported safeguards in the protocol, which the trial court, based on Taylor's ample evidence, rightly found were merely cosmetic. The written protocol adds a facially inadequate "consciousness check" to

be performed by "medical personnel" – that is, a doctor, nurse, or EMT. In upholding the revised protocol, the Eighth Circuit entirely ignored the extensive evidence credited by the trial court that this consciousness check, which merely consists of touching the inmate to see if he responds, will not be effective precisely because the protocol vests unqualified individuals with the task of performing the check.

Personnel without training in anesthesiology will be unable to verify deep unconsciousness, because they lack the training in subtle signs of levels of anesthesia that anesthesiologists receive. CA App. 251-52. Because potassium is excruciatingly painful, inmates must be in a surgical plane of anesthesia to ensure that they will not awaken upon its injection, yet an inmate could *seem* deeply unconscious according to the "consciousness check" even if he is merely shallowly anesthetized. *See* Pet. App. 46a-47a. Moreover, the DOC's practice has been to offer inmates a strong sedative prior to the execution, Trial Tr. 180; inmates who are sedated are unlikely to respond to a touch even if they are in fact conscious. And once the inmate is paralyzed by pancuronium, the check will be entirely ineffectual. CA App. 252-53; Trial Tr. 69, 85. In reality, then, the consciousness check renders the protocol even more dangerous than it would otherwise be, because it provides the false appearance of a safeguard.

The protocol's only other safeguard is that medical personnel will visually inspect the catheter site after the thiopental is injected, which is again a facially inadequate protection. If, as the protocol contemplates, a central line is used, inspection of the catheter site may not reveal problems – particularly to EMTs who have no experience with central lines – because the vein is deep beneath the skin. Trial Tr. 182; CA App. 237. A catheter site check, moreover, does not encompass other IV patency problems, such as improper tubing connections and leaks. Finally, given that the DOC's

personnel have been unable to prevent or remedy IV access problems in the past, Pet. App. 94a, 101a, and there are numerous well-documented instances of execution personnel failing to discern catheter site problems, an IV check performed by poorly trained personnel will not suffice to detect problems.[16] *Morales*, 465 F. Supp. 2d at 979 & n.8; *Lightbourne*, No. 81-170-CF-A-01, at 1-2.

It was the trial court – not the appellate panel – that heard first-hand testimony from the DOC personnel and officials about their qualifications and intentions. And it was the trial court – not the appellate panel – that heard the testimony of the medical experts about type of training was necessary to reliably monitor anesthetic depth. Yet the Eighth Circuit once again cavalierly ignored the trial court's findings in making its own independent judgment on these technical and complex questions of judgment and skill.[17]

2. The Trial Court's Remedy Was Not An Abuse of Discretion.

Based on the evidence and findings recounted above, the trial court entered a remedial order requiring, among other things, that the DOC employ a person trained in

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[16] The protocol also provides that the DOC will wait three minutes after the administration of thiopental before administering the pancuronium. Given that this safeguard is premised on the successful injection of the intended dose of anesthesia, it does not address or remedy any unsuccessful or incomplete administration of thiopental.

[17] Again, if this Court holds that deliberate indifference is the proper standard for adjudicating method of execution claims, this Court should still at minimum summarily reverse the Eighth Circuit for failing to remand the case so that Taylor could develop evidence of deliberate indifference. There is also ample evidence of deliberate indifference in the record for this Court to reverse the Eighth Circuit's ruling and find in Taylor's favor. Having been made aware of the risks of its approach by this litigation, the DOC can now be found to have acted deliberately indifferent to those risks by promulgating its inadequate protocol. *See Farmer*, 511 U.S. at 846 n.9.

administration of anesthesia in carrying out executions. In light of the overwhelming evidence of incompetence and maladministration revealed at trial, that determination was plainly not an abuse of discretion, as it would help ensure qualified, professional oversight over the execution process. Indeed, requiring the use of trained personnel was the most modest and narrowly-tailored remedy that the trial court could have imposed to rectify the numerous and wide-ranging problems with the DOC's procedures. As such, it was error for the Eighth Circuit to reject the trial court's remedy in favor of the DOC's alternative protocol.

Requiring the DOC to obtain help from a qualified professional in carrying out executions is self-evidently a reasonable remedy. The trial record could not have been clearer in demonstrating that the DOC's current personnel and officials were unqualified to carry out the tasks before them, and were in fact disinterested in the mechanics of the execution procedure. The trial court's remedy, which required the DOC to recruit someone trained in the delivery of anesthesia, represented a straightforward solution to the DOC's inadequacies. Such a person could provide qualified oversight over the process, and most importantly, could reliably ensure that the thiopental had taken effect before the remaining two drugs were given. *Id.* 42a.

The reasonableness of the trial court's remedy is clear in light of the alternatives. If the trial court opted not to require monitoring by a trained professional, it would have had two options for changing the procedure to minimize the risk of pain. One approach would have been to impose detailed instructions about how to fix each step of the procedure. But this option would likely have been a futile exercise, and would require extensive judicial supervision. *See Morales*, 465 F. Supp. 2d at 983.

A second course would have been to order the DOC to execute using only a massive dose of thiopental or other

barbiturate, as is used in animal euthanasia. *See Morales*, 415 F. Supp. 2d at 1047; *Morales*, 465 F. Supp. 2d at 983-84. But the court unobtrusively deferred to the DOC's desire to continue using the three-drug protocol. Pet. App. 46a.

The Eighth Circuit failed even to cite the abuse of discretion standard in reviewing the trial court's remedy. It instead conducted an "independent" review and concluded that the Constitution did not require the "use of execution procedures that may be medically optimal in clinical contexts." Pet. App. 22a. That conclusion failed to recognize the remedial nature of the trial court's order, which required such personnel in light of the documented, engrained flaws in Missouri's execution process. Nor did the Eighth Circuit even mention the uncontested fact that the executioners other than Doe were unable and unqualified to exercise any medical judgment throughout the process. Yet apparently the Eighth Circuit believed that these individuals were so trustworthy that the trial court had abused its discretion in requiring the use of a trained professional. Once again, the Eighth Circuit improperly reached its judgment without looking at the facts found by the trial court. Thus, because the trial court's remedy was a reasonable one, the Eighth Circuit erred in vacating it and allowing the DOC to operate instead using its written protocol.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 5, 2007

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